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(17)

IN THE
Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,
v.
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Consistent with the requirements of Article III, can a private citizen maintain an appeal in which the only aspect of the judgment being appealed concerns the amount of a civil penalty payable solely to the United States Treasury?

2. In a case brought under the citizen suit provisions of Section 505 of the Clean Water Act, can the district court impose civil penalties payable solely to the United States Treasury even if it determines that the citizen-plaintiff is not entitled to any equitable relief, such as an injunction, in which it has a personal stake?

3. Notwithstanding the Clean Water Act's jurisdictional prohibition on a citizen suit if a state agency is diligently prosecuting compliance with a permit issued under the NPDES program (33 U.S.C. § 1365(b)(1)(B)), where the State has been active in seeking compliance, can a citizen-plaintiff meet the lack of diligent prosecution jurisdictional requirement by showing that the amount of civil penalties previously imposed by the State was insufficient?

4. Does a citizen-plaintiff have standing under Section 505 of the Clean Water Act and Article III of the Constitution to seek or obtain *any* relief in the absence of any demonstrated harm to the environment when, pursuant to a prior agreement with a state enforcement agency, the defendant previously committed to make "every effort" to achieve compliance, and in fact achieved substantial compliance within two months of the filing of the citizen suit?

5. Where a Clean Water Act citizen-plaintiff fails to obtain either a settlement, injunction, or declaratory relief that materially alters the legal relationship between itself and defendant, can it nonetheless be deemed a prevailing or substantially prevailing party for purposes of an award of attorneys' fees?

6. Can a Clean Water Act citizen-plaintiff recover attorneys' fees as a "catalyst" to the defendant's compliance with the Act where the defendant made commitments to a state agency to comply with the law prior to the suit and, as a result of the state agency's enforcement efforts, came into substantial compliance with all requirements of the Act within two months after the citizen-plaintiff filed its suit?

CORPORATE DISCLOSURE STATEMENT

On June 30, 1998, Respondent Laidlaw Environmental Services (TOC), Inc. changed its name to Safety-Kleen (Roebuck), Inc., which is wholly owned by its parent, Safety-Kleen Services, Inc. (formerly known as LES, Inc.), which is wholly owned by its parent, Safety-Kleen Corp. (formerly known as Laidlaw Environmental Services, Inc.), which is a publicly held corporation traded on the New York Stock Exchange and the Pacific Stock Exchange.

Laidlaw Finance (Barbados), Ltd. is the only corporation that owns 10% or more of the stock of Safety-Kleen Corp. It is wholly owned by its parent, Laidlaw Investment, Ltd., which is wholly owned by its parent, Laidlaw, Inc., which is a publicly held corporation traded on the New York Stock Exchange, the Toronto Stock Exchange, and the Montreal Stock Exchange.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL OF A PARTY THAT HAD NO PERSONAL STAKE IN THE OUTCOME OF THE CASE	10
A. The Court Of Appeals Did Not Have Jurisdiction Over An Appeal In Which Appellants Only Were Pursuing Relief In Which They Had No Personal Stake	10
B. Because Petitioners Abandoned The Request For Relief In Which They Had A Personal Stake, The Court Of Appeals Was Not Required To Determine Whether Laidlaw's Compliance Independently Rendered The Case Moot	14
C. Petitioners Did Not Obtain A Declaratory Judgment Or Any Other Equitable Relief Sufficient To Preserve Appellate Jurisdiction	17
D. The Deterrent Effect Of A Civil Penalty Does Not Provide A Private Plaintiff With Standing To Continue Pursuing Such Penalties	18
E. Irrespective Of Whether Violations Are Continuing, A Case Cannot Continue When The Court Cannot Provide Plaintiff Any Effectual Relief	24

TABLE OF CONTENTS—Continued

	Page
F. No Distinction Between "Standing" And "Mootness" Allows Petitioners To Continue Pursuing This Case	26
II. THE DISTRICT COURT LACKED AUTHORITY UNDER ARTICLE III TO AWARD CIVIL PENALTIES TO PETITIONERS	29
A. A Private Party May Not Pursue Civil Penalties Payable Solely To The Public Treasury	29
B. If A Court May Impose Civil Penalties In A Citizen Suit, It Only Can Do So As An Adjunct To A Proper Injunction	32
III. THE DISTRICT COURT LACKED JURISDICTION TO GRANT ANY REMEDY TO PETITIONERS	35
A. Petitioners Had No Standing To Obtain Equitable Relief Because There Was No Harm To The Environment	35
B. South Carolina's Diligent Enforcement Efforts Barred Petitioners' Suit	38
IV. PETITIONERS ARE NOT ENTITLED TO ATTORNEYS' FEES	41
A. The Attorneys' Fee Question May Not Be Ripe For Decision	41
B. Petitioners Are Not Entitled To Attorneys' Fees Under *Farrar*	42
CONCLUSION	46

TABLE OF AUTHORITIES

CASES

	Page
Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)	13, 27
Ashcroft v. Mattis, 431 U.S. 171 (1977)	14
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	13
Calderon v. Moore, 518 U.S. 149 (1996)	26
Farrar v. Hobby, 506 U.S. 103 (1992)	41, 42, 43
Foundation on Econ. Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991)	37
Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 1999 U.S. App. LEXIS 11201 (4th Cir. 1999)	36-37
Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987)	*passim*
Hensley v. Eckerhart, 461 U.S. 424 (1983)	44
Hewitt v. Helms, 482 U.S. 755 (1987)	17, 18, 41
Honig v. Doe, 484 U.S. 305 (1988)	27
Jones v. City of Lakeland, 175 F.3d 410 (6th Cir. 1999)	40
Lewis v. Casey, 518 U.S. 343 (1996)	30
Linda R. S. v. Richard D., 410 U.S. 614 (1973)	20
Los Angeles v. Lyons, 461 U.S. 95 (1983)	25, 30
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	11, 22, 36, 38
Maine v. Taylor, 477 U.S. 131 (1986)	12
Mills v. Green, 159 U.S. 651 (1895)	14, 26
North & South Rivers Watershed Ass'n v. Scituate, 949 F.2d 552 (1st Cir. 1991)	40
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)	12
Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997)	37
S-1 & S-2 v. State Bd. of Educ., 21 F.3d 49 (4th Cir. 1994)	41
Spencer v. Kemna, 523 U.S. 1, 118 S. Ct. 978 (1998)	13, 26
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003 (1998)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984)	20
Tull v. United States, 481 U.S. 412 (1987)	19
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	33
United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980)	13
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982)	13
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)	23
Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 (1987)	31

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution	
Art. III	*passim*
Judicial Improvement Act of 1990	
28 U.S.C. § 1367	33
Declaratory Judgment Act	
28 U.S.C. §§ 2201, 2202	17
Clean Water Act	
33 U.S.C. § 1365(b)(1)(B)	5, 38, 39
33 U.S.C. § 1365(d)	41

STATEMENT OF THE CASE

Petitioners are private parties who brought a citizen suit under Section 505 of the Clean Water Act ("CWA" or "Act"). They sought an injunction and the imposition of civil penalties to prevent what they alleged was continuing harm to themselves as a result of Respondent Laidlaw's violations of an NPDES permit at a hazardous waste incineration facility.

The district court rejected Petitioners' prayer for preliminary and permanent injunctive or other equitable relief in light of the lack of harm to the environment and Laidlaw's persistent and successful efforts to comply with its permit. At Petitioners' request, however, the district court evaluated the adequacy of civil penalties previously imposed by the State of South Carolina in an enforcement proceeding and determined that those state-imposed penalties—in which Petitioners had no cognizable legal interest or personal stake—should be increased. The district court's determination that the penalties previously imposed by South Carolina were inadequate was the linchpin for its assertion of jurisdiction. Given the denial of any equitable relief and the imposition of a civil penalty payable solely to the United States Treasury, the district court's judgment did not provide *any* relief that benefited Petitioners.

On appeal, Petitioners did not challenge the district court's denial of their prayer for equitable relief. Instead, they focused solely on the amount of civil penalties imposed by the district court. With the ostensible appellants addressing only the amount of fees payable to the United States, and not seeking *any* redress for *themselves*, the court of appeals dismissed the appeal and vacated the judgment. The Fourth Circuit correctly concluded that this action could not be continued on appeal by parties possessing no cognizable interest in the outcome. The court of appeals declined to resolve on the merits the various issues presented regarding the proper amount of

a civil penalty imposed by a state or a federal court in a Clean Water Act case.

The detailed history of this case is set forth in extensive findings made in two opinions issued by the district court. Order of April 7, 1995 (JA 84-137), 890 F. Supp. 470, and Order of January 22, 1997 (JA 138-97), 956 F. Supp. 588.

Laidlaw's 1987 NPDES Permit

Laidlaw's NPDES permit for effluent discharges into the North Tyger River became effective in January 1987. With that permit, the South Carolina Department of Health and Environmental Control ("DHEC") imposed a "dramatic reduction" in the mercury discharge limit from 20 parts per billion ("ppb") to 1.3 ppb. Laidlaw was given one year to achieve the new limit and directed to determine whether it was technically possible to do so. The permit allowed Laidlaw to request a higher mercury limit upon completion of feasibility studies. JA 86-88.

Accordingly, Laidlaw hired Environmental Technology Engineering, Inc. ("ETE") to conduct a feasibility study. JA 88. ETE concluded that meeting the 1.3 ppb limit would be "an 'extremely difficult and complex problem' inasmuch as all available manufacturer's information and reliable equipment on the market demonstrated that current technology was capable of reducing mercury only down to a range of 2 ppb to 5 ppb." JA 143. ETE recommended installation of a second carbon adsorption unit. Laidlaw installed the unit in 1988 and elected not to seek a higher mercury limit. JA 88. The district court found that Laidlaw would "have been justified in returning to DHEC to seek a higher limit. . . . Instead Laidlaw elected a more difficult and costly path. . . . In sum, all parties involved knew that it would be a daunting task to go from 20 ppb to 1.3 ppb but Laidlaw elected to try." JA 177-78.

DHEC's 1988 Enforcement Action

Despite the second carbon adsorption unit, Laidlaw's facility failed to achieve consistent compliance with the 1.3 ppb mercury limit. DHEC responded with an investigation, initiation of an administrative enforcement action, and entry of a consent order on September 7, 1988. The consent order required, *inter alia*, that Laidlaw investigate new treatment technologies, and imposed a $20,000 civil penalty. JA 88.

To comply with the consent order, Laidlaw retained another firm, RMT, Inc. Under DHEC supervision, Laidlaw and RMT tested three potential solutions. The results showed that the Lancy system was most likely to achieve permit limits for all metals, including mercury. The Lancy system was constructed and operational by February 1991. JA 89.

The new system brought Laidlaw into complete compliance with all discharge limits for all metals other than mercury. JA 89. Laidlaw responded by making operational adjustments to the Lancy system. The manufacturer of the system, U.S. Filter, ultimately concluded that it might be impossible for the Lancy system to achieve consistent discharges below the 1.3 ppb level. Therefore, on June 26, 1991, Laidlaw filed a request with DHEC for a higher mercury discharge limit. Nonetheless, through the remainder of 1991 and into 1992, Laidlaw continued to seek some method of achieving the 1.3 ppb mercury level. JA 89-90, 146.

DHEC's 1992 Enforcement Action

After a series of abnormally high mercury excursions in December 1991, DHEC began considering an enforcement action against Laidlaw. On April 10, 1992, Petitioner Friends of the Earth sent a letter to Laidlaw, EPA and DHEC stating an intent to file a citizen suit after sixty days. On May 21, 1992, DHEC served a formal enforce-

ment document on Laidlaw. On June 5 and 8, 1992, DHEC and Laidlaw negotiated a consent decree. JA 90-91, 146. The consent decree, aproved by the Court of Common Pleas, Spartanburg County, South Carolina: (1) required payment of a "civil penalty" in the amount of $100,000 "[f]or all permit violations occurring up to the date of execution of th[e] Consent Order"; (2) required Laidlaw to "use every effort . . . to achieve compliance with the limitation for mercury in its permit"; (3) subjected Laidlaw "to additional enforcement action" for "[f]ailure . . . to comply with the terms and conditions of th[e] Consent Order"; and (4) terminated only if and when Laidlaw achieved compliance with its current or any new permit. JA 76-83, 97.

Pursuant to the decree, Laidlaw continued to explore technologies to remedy its mercury problems, and shut down its incinerator for substantial periods in July, August, September, and November 1992 "in an effort not to violate either its mercury parameter or the judicial consent order with DHEC." JA 92. By August 1992, Laidlaw's own personnel finally achieved substantial compliance with Laidlaw's mercury limit. JA 92, 147, 155, 183. On August 6, 1993, after an extended period of permit compliance, DHEC notified the state court that Respondent had complied with the consent decree, which could then expire. JA 93.

Petitioners' Federal Court Complaint

On June 12, 1992, Friends of the Earth filed this action in the district court under Section 505 of the Clean Water Act. JA 91. Petitioners complained about a variety of alleged violations of effluent limitations, and of monitoring and reporting requirements. JA 37-38. Petitioners acknowledged that DHEC had commenced a civil action concerning the violations alleged in the complaint, but asserted that action "was not diligently prosecuted" because, *inter alia,* the resulting consent decree "provided

inadequate remedies for defendant's violations of its permit." JA 29-30. The district court denied Petitioners' motion for a preliminary injunction on December 14, 1992. JA 53-65.

The District Court's "Diligent Prosecution" Order

Laidlaw sought dismissal of the suit on the jurisdictional grounds that the State's prior enforcement action constituted a "diligent prosecution."[1] 33 U.S.C. § 1365(b)(1)(B). In October and November 1992, the district court heard seven days of testimony on the "diligence" question. On April 7, 1995, it denied Laidlaw's motion and largely embraced Petitioners' theory that DHEC's lack of diligence in seeking compliance could be discerned from its failure to exact what the district court considered a sufficient penalty for past violations. *See* JA 99-106, 121-35. The court found "most persuasive" Petitioners' theory that in imposing a $100,000 penalty, DHEC "failed to recover, or even to calculate, the economic benefit that Laidlaw received by not complying with its permit." JA 121.[2] The district court accepted Petitioners' theory in this respect even though it "agree[d] that no language in the CWA directly requires a state enforcement agency to calculate economic benefit when determining what an appropriate civil penalty should be," and despite that neither DHEC regulations nor DHEC's NPDES En-

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[1] Laidlaw also sought dismissal based on FOE's lack of standing to bring suit, which the district court denied. Tr. of Hr'g on Def.'s Mot. for Summ. J., June 30, 1993, at 40. Laidlaw later moved to dismiss plaintiffs CLEAN and Sierra Club because they did not join FOE's Section 505 notice letter or send a letter on their own behalf—a jurisdictional defect which precludes their pursuit of a citizen suit. 33 U.S.C. § 1365(b). The district court denied that motion. JA 57.

[2] The district court rejected Petitioners' unfounded assertion that DHEC's June 1992 consent decree with Laidlaw was the result of fraud or collusion. JA 117 n.14.

forcement Agreement with the EPA contains such a requirement. JA 127-29. The district court, therefore, retained jurisdiction and allowed the case to proceed to the merits.

The District Court's Decision On The Merits

After another evidentiary hearing, the district court issued its merits findings on January 21, 1997. The court found that DHEC played an extensive role in the process that ultimately solved the discharge problems: "DHEC was made aware on a continuous basis of the compliance problems Laidlaw was experiencing. An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation." JA 162. Furthermore:

> DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of time.

JA 162-63. The district court also found that the permit exceedances had caused "no demonstrated adverse affect on the environment." JA 164.

The district court denied Petitioners' prayer for equitable relief, finding that the "lack of demonstrated harm and the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit compels the conclusion that no injunction or other form of equitable relief is appropriate." JA 183. The court specifically found that Laidlaw already had been in full compliance for non-mercury metals discharges since 1991, and in "substantial compliance" with respect to mercury discharges since "at least" August 1992. JA 89, 183.

The district court nonetheless assessed additional civil penalties beyond those imposed by the State.[3] JA 160-82. After acknowledging a number of mitigating factors—including Laidlaw's good faith efforts to comply with a "draconian" mercury level requirement, the expenditure of over $1,000,000 on consultants and technology, its coordination with the State's environmental agency, and the absence of harm to the environment (JA 146, 162, 173-74)—the court imposed a sanction for each mercury permit violation since January 1987, for a total of $405,800. JA 172, 185-95. Based on the per discharge penalty established by the district court (JA 181), the fourteen post-complaint exceedances constituted $15,000 of the total penalty. JA 195. The ten reporting and thirteen post-complaint monitoring violations constituted an additional $2,300 of the total penalty. JA 159, 181. The district court also stayed the time for a petition for attorneys' fees until after resolution of any appeals.

The Court of Appeals' Decision

Petitioners appealed from the district court's civil penalty judgment, "arguing that the district court abused its discretion by imposing what Plaintiffs assert was an inadequate penalty." 149 F.3d 303, 305. Laidlaw cross appealed, arguing that Petitioners lacked standing and that the case should have been barred in light of DHEC's diligent efforts to seek compliance prior to Petitioners'

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[3] The penalty assessment required the district court to detail the history of Laidlaw's mercury exceedances and reporting violations, most of which pre-dated the filing of the federal case. Of 489 total exceedances, only 11 occurred between June 12 and October 1992 and one each in 1993, 1994 and 1995. JA 158, 178. The last two occurred when Laidlaw was not even feeding mercury into its incinerator. Moreover, the last two also did not exceed the new 10 ppb permit limit established by the State, which would have been in effect but for the state administrative appeal that Petitioners had taken challenging the new limit. JA 148-49, 178. Only 10 minor technical reporting requirements violations and 13 monitoring violations occurred after the filing of Petitioners' complaint. JA 159.

complaint. *Id.* The Fourth Circuit concluded that the case was moot "[b]ecause plaintiffs ha[d] not appealed the denial of declaratory and injunctive relief," and under *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003 (1998), civil penalties payable solely to the United States Treasury do not "redress any injury suffered by a citizen plaintiff." *Id.* at 306. Because Petitioners could not obtain relief on the merits, the Fourth Circuit also held that they could not recover attorneys' fees. *Id.* at 307 n.5.

SUMMARY OF ARGUMENT

Because Petitioners' appeal addressed only the civil penalty judgment in which they themselves had no personal stake, their appeal could not proceed. They have no personal stake in an award of civil penalties that is not payable to them, but to the United States Treasury. *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1018 (1998). The possible deterrent effect of a judgment for civil penalties does not provide a private party, which can lay no claim to any part of those penalties, with a sufficient personal stake in the outcome of a case to sustain a federal court's jurisdiction. In the absence of parties on both sides of the question having a personal stake in the outcome of the appeal, it would have been improper for the court of appeals to resolve the difficult substantive issues concerning the proper standards to be used by the State or the district court in imposing a civil penalty.

Assuming that it is necessary for this Court to reach the issue, it is also clear that the district court could not award civil penalties in the first instance. Once the district court properly denied Petitioners' request for any equitable relief, it should not have imposed civil penalties. It is doubtful that a federal court ever has jurisdiction to entertain the claim of a private party that seeks the payment of

money not to itself but to the public treasury. At a minimum, however, the only way to assure that the court has some basis for jurisdiction at all stages of a citizen suit is for civil penalties to be awarded only as an adjunct to a proper and necessary injunction.

In this case, however, no judgment was proper because Petitioners lacked standing from the outset. As the court found, there was no harm to the environment. Moreover, at the time of suit, Laidlaw had committed in a consent decree to use every effort to avoid future violations—an agreement that caused Laidlaw temporarily to shut down its facility, and under which Laidlaw acted to eliminate the last, nagging technical difficulty that would allow the facility to operate in complete compliance. This case, therefore, did not present the type of ongoing injury or ongoing violation on which a citizen suit can proceed. Finally, in light of the jurisdictional prohibition barring a citizen suit when the State is already diligently seeking compliance, jurisdiction was lacking here. Where the State actively has pursued *compliance*, a jurisdictional finding of lack of diligence cannot be based, as it was here, on dissatisfaction with the magnitude of the civil penalties previously imposed by the State.

Assuming it is proper to reach the question here, attorneys' fees could not properly be awarded in this case because Petitioners did not obtain a judgment or settlement that provides any relief to them. Moreover, the district court found that Laidlaw's compliance was prompted by the State agency, not the citizen suit.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL OF A PARTY THAT HAD NO PERSONAL STAKE IN THE OUTCOME OF THE CASE

A. The Court Of Appeals Did Not Have Jurisdiction Over An Appeal In Which Appellants Only Were Pursuing Relief In Which They Had No Personal Stake

Petitioners presented an appeal to the Fourth Circuit starkly inconsistent with Article III's case-or-controversy requirement. On appeal, Petitioners abandoned their earlier claim for an injunction—a remedy in which they would, in theory, have a personal stake because it would bar the defendant from engaging in conduct that would cause Petitioners harm. Instead, Petitioners' appeal was concerned solely with the amount of the civil penalty that the district court ordered payable to the United States and to which Petitioners could lay no claim. A citizen-plaintiff has *no* cognizable legal interest in, and thus *no* standing to prosecute, an action seeking the exaction of a civil penalty payable solely to the public treasury. *See Steel Co.*, 118 S. Ct. 1003.[4]

"Standing" is a fundamental part of the "case-or-controversy" requirement that circumscribes the jurisdiction of Article III courts. Standing has been divided into three elements: a plaintiff must have suffered, or in an equity action be threatened by, some concrete injury; the injury must be caused by defendant's conduct; the injury must be redressable by the court. *See Steel Co.*, 118 S. Ct. at

[4] *Steel Co.* was decided during the pendency of the appeal, and plainly applies to citizen suits brought under the Clean Water Act. A civil penalty payable to the United States Treasury can no more provide a personal benefit to the citizen-plaintiff under the Clean Water Act than it could under the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. §§ 11001 *et seq.*, at issue in *Steel Co.*

1016-17. The basic requirement that a lawsuit in the federal courts can proceed only when it offers the plaintiff an opportunity to obtain concrete relief reflects the traditional, limited role of the federal courts within our constitutional structure.

Where a case involves past injury, the issue of redressability ordinarily presents little difficulty. If monetary relief is available in the form of damages, the award of such relief to the plaintiff will redress the injury by providing plaintiff with compensation. When the case involves only the threat of future harm, the issue of redress turns on the availability of some form of equitable relief that would bar the defendant from engaging in wrongful conduct that otherwise would harm the plaintiff.

Civil penalties that are not payable to the citizen-plaintiff do not redress its injuries or provide it with a personal stake in the outcome of the case sufficient to ground a federal court's jurisdiction.[5] A citizen-plaintiff does not have a personal stake in a monetary judgment requiring payment to another party—particularly where the payee is the public treasury. Such a payment is not compensation for the plaintiff's past injury, and is not compensation to the plaintiff if paid to someone else. Nor can such a payment be equated with an injunctive decree that bars the defendant from engaging in conduct that will harm the plaintiff.

That the plaintiff has suffered or is threatened with injury at the hands of the defendant may therefore be presumed for purposes of analysis here, as it was in *Steel Co.*, 118 S. Ct. at 1018. It also may be assumed that the

[5] Petitioners lay no claim to any part of those penalties. This was not the "unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit by providing a cash bounty for the victorious plaintiff." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

plaintiff will derive satisfaction from the fact that someone who has caused injury is directed to pay a penalty. *Id.* at 1018-19. But neither the fact of injury nor the hope of such psychic satisfaction provides a "personal stake" in civil penalties sufficient to satisfy Article III. The satisfaction derived from directing money to the Treasury, or punishing a wrongdoer, "is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* at 1019. With a request for civil penalties, a private plaintiff actually "seeks not remediation of its own injury . . . but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the law]." *Id.* at 1018 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557 (1992)). Within the federal system, only governments have a cognizable general interest in enforcing the law sufficient to sustain federal court jurisdiction.[6]

Through the exercise of equity power, a federal court may provide relief that benefits many more people than just the individual plaintiff. But the relief must always *at least* directly benefit the plaintiff. A personal stake in the outcome is what assures the concrete adverseness upon which the courts depend.[7] It also confines the federal

[6] A sovereign has a cognizable interest in enforcing the law and imposing punishment; a private party does not. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986). The Executive Branch is designated to enforce the law on behalf of the United States. Serious Appointments Clause and Separation of Powers issues are raised by the Legislative Branch's effort to empower private parties to invoke the jurisdiction of the federal courts in pursuit of civil penalties payable solely to the United States. If private parties are allowed to stand in for Executive Branch officials, those private parties must *at least* have a personal interest in the outcome (*i.e.*, financial recovery, on the one hand, or equitable relief on the other) that is the hallmark of a private suit.

[7] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (stating that Article III standing requires " 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues' ") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) ("The requirement of 'actual injury redressable by the court' . . . tends to assure that the legal questions will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequenecs of judicial action.") (internal citation omitted).

courts to their traditional role consistent with separation of powers principles. The personal stake in the outcome provides the only basis upon which a federal court may wield judicial power. It must, therefore, exist at all stages of the case.[8] Article III is no less important at the stage at which judicial power is most forcefully exercised (the remedy stage), than when the case is first presented.

The requirements of Article III are as important on appeal as at the inception of a case. If there is no party with a personal stake in the outcome to pursue the appeal, the appeal must be dismissed.[9] It has long been the rule that

> when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever,

[8] *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."); *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 983 (1998) ("throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision' ") (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

[9] *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' "); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 549 (1986).

> the court will not proceed to a formal judgment, but will dismiss the appeal.

Mills v. Green, 159 U.S. 651, 653 (1895). The same rule necessarily applies where, as here, the plaintiff abandons on appeal its only claim for "effectual relief." *Cf. Ashcroft v. Mattis*, 431 U.S. 171 (1977) (per curiam).

This case illustrates the danger of allowing a party to prosecute an appeal in which it has no direct stake in the outcome. The heart of Petitioners' appeal concerned the important issues related to the proper measure for a state agency or a federal court to employ in assessing a civil penalty for violation of the Clean Water Act. Yet the State of South Carolina, whose penalty assessment policies and enforcement practices were assailed, was not party to the trial or the appeal. *Cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987) (noting the potential that citizen suits will undermine state enforcement efforts). Moreover, the United States—the only entity with a direct interest in the assessment of the civil penalties awarded by the district court—also was *not* a party to the appeal, or at any other stage of the case.

In the absence of parties on both sides possessing a personal stake in the outcome, the court of appeals properly dismissed the appeal and vacated the judgment.

B. Because Petitioners Abandoned The Request For Relief In Which They Had A Personal Stake, The Court of Appeals Was Not Required To Determine Whether Laidlaw's Compliance Independently Rendered The Case Moot

Petitioners and Amicus United States argue that the appeal could not be dismissed as moot unless Laidlaw showed that its permit discharge problems "could not reasonably be expected to recur," obviating any threat of future harm. Pet. Br. 23; Br. for the United States as Amicus Curiae ("Gov't Br.") 26. They argue that it was

necessary for the district court or the court of appeals to first render a specific finding to that effect before dismissing the case as moot.

But a specific finding that "voluntary cessation" of conduct has eliminated the threat of future harm is not the only basis to find a case moot. As noted above, a plaintiff's own actions can moot a case, and that is precisely what happened here. On appeal plaintiffs abandoned their request for an injunction or other equitable remedies, thereby giving up every claim for relief that could provide them with personal benefits. Consequently, the case could not proceed—and there was no need for the court of appeals to determine whether Laidlaw met the "heavy burden" [10] of showing that there was no threat of future harm.

In denying the injunction, the district court concluded that Laidlaw "is now and has for an extended period of time been in compliance." JA 183. It did not believe that Laidlaw was required to "show that there is no chance of a future permit violation."[11] JA 183. Such a strong showing may be appropriate where the defendant seeks to put a premature halt to proceedings by having the case declared moot. But denial of injunctive relief on the merits did not ultimately require that degree of certainty. In light of the fact that there had been no harm to the environment, and

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[10] The "heavy burden" of showing mootness has been applied only in cases where mootness is raised by a defendant's self-serving assertion that *it* has ceased the offending conduct. No similar heavy burden has been imposed where mootness is the product of plaintiff's own actions or litigation decisions.

[11] Although the district court did not make a finding that there was absolutely no possibility of future harm, it is obvious from the record that it perceived no such threat, and denied an injunction on that basis. Moreover, in light of the fact that the facility has been closed, there can be no serious argument about a threat of future harm sufficient to ground federal court jurisdiction in pursuit of an injunction. *See* Respondent's Suggestion of Mootness, filed June 9, 1999.

that Laidlaw had worked cooperatively with DHEC to comply with an unnecessarily stringent standard, the many years of compliance were sufficient to demonstrate that no equitable remedy was required to protect Petitioners from future harm. Petitioners did not challenge these findings. Having been denied the *only* form of relief in which they had an interest—a form of relief that is designed specifically to prevent future harm—and not challenging that denial on appeal, there was no basis to continue the case.

Ignoring this principle, Amicus United States argues that the "court of appeals erred in ruling that a Clean Water Act citizen suit . . . must be dismissed as moot if the district court concludes that injunctive relief is unwarranted." Gov't Br. 8. Petitioners and the United States insist that the question the Court should address is whether a citizen suit becomes moot after the citizen's request for injunctive relief is *denied*.

As shown above, that is not the question presented. Indeed, the answer to that question as posed is plainly "no," although *not* for the reasons suggested by Petitioners and the United States. Denial of an injunction is a disposition on the *merits*, not a disposition of the case as moot. If, after injunctive relief was denied, Petitioners appealed that decision, the appellate court would have jurisdiction to consider Petitioners' challenge to that denial. But where, as here, Petitioners are no longer even *seeking* relief for themselves, that fact is dispositive.

This does not mean that it would be proper for the district court to impose civil penalties after denying an injunction, even if the plaintiff had not abandoned its claim for injunction. To the contrary, as shown below, a federal court's authority to impose civil penalties in a suit by a private party is doubtful under any circumstances. The notion that a party can obtain relief for someone other than itself is inconsistent with Article III's case-or-controversy requirement. *See* Part IIB, *infra*.

In Laidlaw's view, however, Petitioners' decision to abandon the injunction claim on appeal is dispositive and obviates the need to answer the questions posed by Petitioners and the United States regarding the precise circumstances under which a district court lacks a jurisdictional basis to exact penalties in a CWA citizen suit.

C. Petitioners Did Not Obtain A Declaratory Judgment Or Any Other Equitable Relief Sufficient To Preserve Appellate Jurisdiction

Petitioners argue that their failure to pursue an injunction on appeal is not fatal because they obtained a different form of equitable relief from the district court, a "declaratory judgment as to liability." Pet. Br. 40, 42. Petitioners' assertion is without basis in the record and without support in the law.

No "declaratory judgment as to liability" was ever issued pursuant to 28 U.S.C. §§ 2201, 2202. Petitioners sought "both a declaratory judgment and injunctive relief" (JA 182), but the district court declined to grant *either*, explaining "the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit compels the conclusion that *no injunction or other form of equitable relief is appropriate. Accordingly, plaintiffs' request for equitable relief is denied*." JA 183 (emphasis added).

What Petitioners call a "declaration of liability" is the district court's finding of liability in imposing a civil penalty. This Court has held, however, that the incidental pronouncement of a court on a matter of law or fact is *not* equivalent to a declaratory judgment. To "suggest such an equivalency is to lose sight of the nature of the judicial process." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987); *see also id.* at 762 ("[T]here is a very practical objection to equating statements of law (even legal holdings en route to final judgment for the defendant) with declaratory judgments.").

Moreover, there is a fundamental difference between a "declaration of [past] liability" and the type of declaratory judgment, prospective in nature, that actually will forestall a threatened injury and thus provide some benefit to the plaintiff. For example, a declaration that a law is unconstitutional or a regulation invalid is presumed to provide redress as effective as an injunction because of its prospective effect. The government is expected to refrain from enforcing a law that a court has declared unlawful. Similarly, private parties who seek a declaration about the meaning of a contract or title to property may have standing to seek that declaration because it will control their future behavior. The effect of a judicially enforceable declaratory judgment on the parties' ongoing relationship provides concrete relief to the plaintiff by materially altering the legal relationship of the parties. *Id.* at 761.

In contrast, a "judicial statement that does not affect the relationship between the plaintiff and the defendant is *not* . . . equivalent [to a declaratory judgment]." *Id.* (emphasis in original). A "declaration of liability," without more, is inherently retrospective. Likewise, an award of civil penalties for past wrongs will not preclude future wrongs. Petitioners fail to grasp the distinction between a civil penalty ruling concerning only past liability, which benefits them not at all, and the grant of some form of equitable relief that will protect them from future harm, which the district court found unnecessary.

D. The Deterrent Effect Of A Civil Penalty Does Not Provide A Private Plaintiff With Standing To Continue Pursuing Such Penalties

Amicus United States argues that upon an initial showing of a continuing violation, unless and until the court makes a finding that there is no longer any threat of future injury, a private plaintiff should independently have standing to pursue civil penalties to deter possible future violations. Gov't Br. 24. Under this theory, the possible deterrent effect of the penalty independently provides the plaintiff with the required personal stake in the outcome to continue a case, whether or not plaintiff even seeks an injunction to stop a violation.

This theory is advanced by Petitioners and the United States without support from this Court's cases, or any historical analogue involving the jurisdiction of the federal courts.[12] Indeed, it appears contrary to conventional understandings concerning the differing roles of civil penalties and equitable remedies. Injunctions and declaratory orders are designed to provide prospective relief by prohibiting (or requiring) action to prevent future harm. In contrast, civil penalties are retrospective in design. They punish past behavior.[13] Private plaintiffs have heretofore had no legally recognized interest in the exaction of penalties for the benefit of the public. "[I]n American jurisprudence at least, a private citizen lacks a judicially cog-

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12 Under that theory, citizens would have standing to compel the government to prosecute law violators on the grounds that such prosecutions will deter future violations. But, in contrast with those state courts which allow citizens to prosecute criminal cases in some circumstances, the federal courts have never been offered as a forum for private party criminal prosecutions. The restrictions of Article III itself, and the clear constitutional assignment of responsibility for enforcing the law to the Executive Branch, preclude such private enforcement actions. The Legislative Branch cannot permissibly encroach on the power of the Executive Branch by assigning Article II power to private parties, at least absent some traditional private-party controversy that independently grounds the jurisdiction of the federal court.

13 The Clean Water Act reflects Congress' view that civil penalties are retrospective in focus—meant to punish for past violations. While the imposition of penalties may, of course, deter noncompliance, this Court has recognized the essential punitive nature of civil penalties under the Act. *Tull v. United States*, 481 U.S. 412, 422 (1987) (penalties authorized under § 1319(d) are "of th[e] character" of "[r]emedies intended to punish culpable individuals").

nizable interest in the prosecution or nonprosecution of another." *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

Petitioners stretch for precedential support for their theory from the statement in *Gwaltney* that "citizens . . . may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." 484 U.S. at 59. Petitioners read this sentence as holding that penalties "abate" violations. *See* Pet. Br. 17. But the Court's opinion did not go that far. The Court simply postulated, consistent with the statute, that civil penalties may be proper as an adjunct to a case brought to enjoin or abate violations. The Court did not say or imply that civil penalties themselves abate an ongoing violation, let alone that such a theory would comport with the requirements of Article III.

Petitioners' reliance on deterrence as providing the basis for Article III standing for private parties to seek the imposition of civil penalties fundamentally misapprehends the mechanism through which "deterrence" works. The heart of the deterrence rationale is the *threat* that penalties will be imposed in the future, not the actual exaction of penalties for what has taken place in the past. Thus, Petitioners might plausibly have an interest in the issuance of a court order that declared any future violations of the CWA by Laidlaw would result in the mandatory imposition of a $25,000 penalty. Such an order would be addressed directly to future behavior, creating a deterrent to future wrongdoing.[14] In contrast, an order actually imposing a penalty for prior wrongdoing is addressed primarily to the past.

[14] Consent order provisions setting penalties for future violations are a common way for government enforcement agencies to pursue enhanced deterrence against such violations.

This is not to belittle the utility of deterrence. The availability of civil penalties under a statute adds to the statute's deterrent force. Moreover, seeing the law actually enforced against someone has some additional, general deterrent force. That general deterrence does not, however, provide the plaintiff with specific relief to redress his own injury in any particularized sense. *See Steel Co.*, 118 S. Ct. at 1018-19 (interest in deterrence does not satisfy Article III).

The United States and Petitioners focus on the marginal additional deterrent force on a particular company associated with imposing civil penalties on that company. Of course, in the context of this case, they are talking about the marginal chastening force of imposing *additional* civil penalties on a party that not only had been making every effort to comply with the law, but already had been subjected to civil penalties by the State, which has the primary responsibility for balancing penalties against other interests in prompting compliance.[15]

The theory "that the punishment will deter the risk of future harm" was the subject of a concurring opinion in *Steel Co.*, but was found by the Court to reach too far. "Obviously, such a principle would make the redressability requirement vanish." *Steel Co.*, 118 S. Ct. at 1018. There is a fundamental difference between a judicial decree that *directs* future compliance with a statute, regulation or judicial rule, thus by its terms barring actions which may cause harm to the plaintiff, and the exaction of penalties for past harm, which may deter future misconduct but does not prohibit it. The former provides direct redress of the plaintiff's injury; the latter does not.

[15] Of course, the threat of civil penalties is always present under the CWA, whether or not citizens can pursue them. The State and the EPA can, and do, pursue civil penalties in cases across the country.

Thus, a plaintiff has standing to seek an injunction that would prohibit some conduct by the defendant that harms the plaintiff. The injunction is deemed to be a proper subject of a private suit because the rule of law rests on the assumption that laws and court orders will be obeyed, and therefore control a party's conduct. But the cases have not suggested that individuals have standing to pursue civil penalties for past wrongs on the theory that such punishment *may* affect a defendant's future behavior.

Whether the meting out of penalties for past wrongs will have a deterrent effect in any particular situation is uncertain—depending on a multitude of factors, such as the financial status of the company and the personality of its managers. It is impossible to say that any given award of civil penalties will prevent any specific future violations of the law. It must be " 'likely,' as opposed to merely 'speculative,' that the injury" of which plaintiff complains "will be 'redressed by a favorable decision.' " *Lujan*, 504 U.S. at 561 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

As advanced in this case, the deterrence argument is, at most, tenuous. The findings of the district court made clear, based on at least five years of Laidlaw's continuous compliance, that the threat of future harm was almost nonexistent. Thus, the deterrence suggested by the United States was directed to a nonexistent (or barely existent) threat. Moreover, it is difficult to see the incremental deterrent impact on a company that had been actively pursuing compliance, had made (notwithstanding potential objections to the standards) costly efforts at compliance, and was already obligated in an agreement with the State to put an end to mercury violations. Moreover, the State had, in the exercise of its discretion, already exacted penalties for those same violations. The district court found here that it was *mandated* under the Act to impose civil penalties for past violations. JA 160. This undermines

the notion that civil penalties were imposed here in order to deter Laidlaw from future violations. If the threat of future harm were real, the court's first recourse would necessarily be to a traditional means of barring future harm by injunction, not to the speculative influence of penalties for past violations.

Petitioners and Amicus United States place heavy reliance on the statement in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982), that "an injunction is not the only means of ensuring compliance." The Court stated there that "the *FWCPA itself*, for example provides for fines and criminal penalties." *Id.* (emphasis added). In so doing, the Court was addressing the contention that an injunction must issue in connection with every violation of the Act or else the regulated community would be free to ignore the requirements of the Act with impunity. The Court simply pointed out that the statute *of its own force* deters violations by establishing fines and criminal penalties for noncompliance.[16]

The deterrence argument of the United States turns the traditional role of civil penalties upside down. In a government action, the availability of penalties for past violations would ordinarily *obviate* the necessity of examining continuing injury in a mootness inquiry; the availability of the retrospective remedy would keep the case alive. Here the United States suggests the opposite result—that such civil penalties can *only* be imposed if there is a threat of future harm. In fact, the district court's jurisdiction to exact civil penalties is, under this theory, specifically connected to the deterrent effect of the penalties on the particular party—and presumably the amount of the pen-

[16] Courts, however, compel compliance in particular cases by issuing orders that require obedience. They do not do so by imposing penalties for past violations. Indeed, the Court explained in *Romero-Barcelo* that the district court in that case had acted to assure compliance not, as Petitioners would have it, by imposing penalties, but by "ordering the Navy to apply for a permit." 456 U.S. at 315.

alty must be specifically calibrated only to deter, for the court may not use the penalty to exact retribution.

Petitioners' arguments highlight the overbreadth of their deterrence rationale as a basis for standing. Laidlaw filed a Rule 21 Suggestion of Mootness in this Court based on the fact that it ceased all operations at the facility that was the subject of this lawsuit. Although that cessation precludes the possibility of any further harm at the only facility owned and operated by Respondent, Petitioners argue that imposing civil penalties on Respondent will deter future violations at "16 other NPDES permitted facilities," owned and operated by corporate affiliates of Respondent near where some of Petitioners' members live. *See* Pet. Resp. to Suggestion of Mootness 8. Under that theory, anyone who lives within shouting distance of any facility owned and operated by a corporate affiliate of Respondent anywhere in North America would have standing to maintain a suit for civil penalties in connection with *this* facility because the deterrent effect of the award of civil penalties here might be said to deter Laidlaw from violating the law elsewhere.

E. Irrespective Of Whether Violations Are Continuing, A Case Cannot Continue When The Court Cannot Provide Plaintiff Any Effectual Relief

Petitioners and Amicus United States also argue that the existence of a continuing violation has independent jurisdictional significance. Under this theory, a continuing violation at the outset of a case provides the court with jurisdiction; once the court has jurisdiction, it can issue any remedy it desires so long as it chooses to retain that jurisdiction. In support of this theory, Petitioners note the "heavy burden" on a defendant that seeks to have a case dismissed as moot based on its contention that it has stopped violating the law. But in emphasizing this point, Petitioners reveal a fundamental confusion about the reasons *why* the existence of a continuing violation is important.[12] A continuing violation is indicative of a realistic threat of future injury, which is, in turn, the predicate for a court to grant an injunction. It is the answer to the question whether some effectual remedy continues to be available to plaintiffs, not simply whether harm is continuing, that determines whether an Article III case or controversy still exists.

In connection with a Clean Water Act citizen suit, an ongoing violation is important for two related reasons. First, the ongoing violation fulfills the *statutory* requirement that a citizen-plaintiff must allege "a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. This sounds exactly like the precondition for an injunction; Congress clearly made it a precondition to suit.

Second, the issue of an ongoing violation is frequently addressed in connection with "mootness." The focus there is whether defendant's "voluntary cessation" obviates the threat of future harm and thus divests the court of its authority to grant any relief. The threat of future harm is important because it is the precondition for granting equitable relief to the plaintiff. *Cf. Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (referring to the "equitable doctrine that cessation of the challenged conduct does not bar an injunction"). The ability to potentially grant *some* relief to the plaintiff is the predicate for the court's continued exercise of its jurisdiction. The significance of the continuing violation for purposes of the mootness inquiry is

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[17] The traditional resistance to a defendant's self-interested assertion that it has voluntarily stopped engaging in wrongful conduct is *not* due to some unstated rule that having overcome its initial reluctance to take the case, a court becomes even more reluctant to give it up. The resistance simply reflects skepticism about a defendant's self-interested assertion that it has suddenly mended its ways. *See Steel Co.*, 118 S. Ct. at 1020; *Gwaltney*, 484 U.S. at 67.

thus tied to whether the court continues to be in a position to provide redress for the plaintiff's injury.[18] *See generally Steel Co.*, 118 S. Ct. at 1020.

The ultimate question, therefore, is whether the court will be able to provide "effectual relief." *Mills*, 159 U.S. at 653. This reflects the broader link between "mootness" and redressability.[19] If the court cannot provide the plaintiff any effectual relief, the case cannot continue and must be dismissed, regardless of whether there is a "continuing violation."

F. No Distinction Between "Standing" And "Mootness" Allows Petitioners To Continue Pursuing This Case

Petitioners argue that *Steel Co.* was a standing decision, while this case involves only mootness. They suggest, in essence, that standing is a rigid doctrine designed to keep interlopers out of court, but once they have passed the portals, "mootness" is flexibly applied to allow them to stay. Pet. Br. 23-24. Petitioners thus assert that having successfully invoked the district court's jurisdiction by alleging and proving a continuing violation at the beginning of the case, they may continue the case on appeal in pursuit of additional civil penalties even if the violations have ceased.[20]

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[18] Obviously, if the plaintiff may recover damages, the court's jurisdiction is unaffected by whether the violation is continuing. Conversely, if in an equity action the court suddenly was stripped of all power to grant an equitable remedy, the case would be dismissed on the merits. Plaintiff could not maintain the case, or the court its jurisdiction, with no relief available.

[19] *See, e.g., Spencer v. Kemna*, 118 S. Ct. at 988 (mootness arises when there is "nothing . . . to remedy"). *Cf. Calderon v. Moore*, 518 U.S. 149, 150 (1996) (availability of possible remedy keeps a case from being moot).

[20] This case illustrates the likely consequences of such an approach. Based on its commitments to the State that preceded this

The distinction Petitioners (and, to a lesser extent, Amicus United States) posit between standing and mootness is not to be found in the Constitution. Both doctrines derive from the application of the same case-or-controversy requirement.[21] The ultimate question on mootness, as it is on initial standing, is whether there continues to be a controversy before the court in which the parties have a personal stake and for which the court can provide redress.[22] Petitioners' theory that having alleged jurisdiction at the outset, a plaintiff may then go on to pursue civil penalties irrespective of some independent basis of standing to do so is, of course, inconsistent with

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lawsuit, Laidlaw came into compliance with the non-mercury exceedance limits by March 1991 and into substantial compliance with mercury limits no later than August 1992, shortly after the suit began. JA 183. The district court nonetheless proceeded to examine hundreds of pre-complaint violations. JA 158-59, 178. Although the focus of the citizen suit is primarily to afford affected citizens a means of protecting themselves from harm when the government cannot, or will not, command compliance (*see Gwaltney*, 484 U.S. at 62), by the time the district court turned to the substantive issues in its 1995 and 1997 opinions, the straightforward matter of bringing Laidlaw into compliance was long since resolved. Instead, the trial court focused on the difficult issues associated with meting out appropriate penalties for violations that took place long ago and had been redressed by Laidlaw's and the State of South Carolina's efforts to find a workable method of limiting Laidlaw's mercury discharges.

[21] Indeed it has been said that moootness is simply "the doctrine of standing set in a time frame." *Arizonans*, 520 U.S. at 68 n.22 (quoting *Geraghty*, 445 U.S. at 397).

[22] The redressability principle is at the core of Article III. It informs conceptions of both standing and mootness. Even if one regards mootness as a prudential doctrine allowing the courts to consider moot cases "where there are strong reasons to override" the doctrine, *Honig v. Doe*, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring), the fact remains that those "strong reasons" are rarely found. The federal courts' institutional interests that require the mootness doctrine to be "overridden" in rare cases have never been found to exist in a whole class of cases, *e.g.*, CWA citizen suits, such as those at issue here.

the settled understanding that a proper case or controversy must exist at all stages of a suit.

Petitioners' reliance on *Gwaltney* is especially suspect. *Gwaltney* addressed whether citizen-plaintiffs could nonetheless "press their suit to conclusion" where "allegations of ongoing noncompliance [sufficient to invoke the court's jurisdiction] become false at some later point in the litigation *because the defendant begins to comply with the Act.*" 484 U.S. at 66 (emphasis added). This Court found they could not. Once "defendant begins to comply with the Act"—at least in the sense of obviating any likelihood of future harm—the case is moot and the action must be dismissed. The Court emphasized the "heavy burden" on the defendant in seeking to obtain dismissal by virtue of voluntary cessation of its alleged wrongful conduct. But the Court expressed no doubt that if violations convincingly ceased—obviating the threat of future harm—the action could not proceed simply to obtain penalties for past violations. *Id.* at 66-67. Indeed, the Court explained that "plaintiffs are also protected from the suddenly repentant defendant by the authority of the district courts to award litigation costs 'whenever the court determines such award is appropriate.'" *Id.* at 67 n.6. The Court's discussion of these "protections" from the "repentant defendant" would have been wholly unnecessary if, as Petitioners suggest, a plaintiff may continue to prosecute a claim for civil penalties even after the defendant has ceased violating the Act.

Petitioners also argue that a close view of *Gwaltney* would show that violations in that case ceased before the action was filed, that the district court denied an injunction, and that the denial of the injunction was not appealed, yet the Court did not dismiss the case as moot. Pet. Br. 15. Petitioners reason that since the Court "implicitly, but clearly, held that the case was not moot, it

necessarily concluded in *Gwaltney* that injunctive relief is not essential for Article III jurisdiction in a citizen suit where ongoing violations are alleged and proved." Pet. Br. 17. In *Steel Co.*, the Court commented on another effort to read jurisdictional rulings into *Gwaltney*, cautioning against reliance on "drive-by" jurisdictional holdings of the kind that Petitioners construct. 118 S. Ct. at 1011.

Even on its own terms, however, Petitioners' effort to derive a constitutional holding out of *Gwaltney's* failure to find the case moot is ill-conceived. The Court vacated the civil penalties awarded in the lower court, focusing on the possible absence of *statutory* jurisdiction. Where the Court identifies a lack of jurisdiction on one ground, this cannot be taken to mean that the Court held that the plaintiff surmounted every other jurisdictional hurdle not addressed in the Court's opinion.

II. THE DISTRICT COURT LACKED AUTHORITY UNDER ARTICLE III TO AWARD CIVIL PENALTIES TO PETITIONERS

A. A Private Party May Not Pursue Civil Penalties Payable Solely To The Public Treasury

Under this Court's decisions, it is doubtful that a private party can ever be awarded a judgment requiring payment of a civil penalty solely to the United States Treasury. This limitation on the remedies a private party may obtain exists whether or not the federal court has *jurisdiction* over some other claim presented by that private party.

Article III is not simply a statement of jurisdiction. Rather, it is a description of the federal judicial power. It is inconsistent with the proper, historic limitations on judicial power to allow it to be exercised—*i.e.*, to dispense punishment—on behalf of someone who has no legally cognizable interest in the remedy.

The federal court's remedial power may only be exercised on behalf of a party who has standing to seek the remedy in question. Thus, in *Lyons,* this Court held that there was no jurisdiction over a party's request for a broad injunction that, while possibly benefiting others, was unlikely to prevent any future harm to the plaintiff himself. 461 U.S. 95. The fact that the plaintiff was previously the victim of such harm did not provide standing to pursue equitable relief.

This Court addressed a similar issue in *Lewis v. Casey,* 518 U.S. 343 (1996). The Court found jurisdiction over certain claims of the prisoner plaintiffs. But this did not provide the district court with the authority to grant equitable relief throughout the prison system or to remedy harms quite unlike those suffered by the prisoner-plaintiffs. As the Court pointed out, "standing is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." 518 U.S. at 358-59 n.6. Whether or not a federal court has jurisdiction over some claim (as in *Lyons,* for an award of damages), plaintiffs may only obtain *relief* that benefits themselves.

This Court's historic concern that issues can properly be presented only by a party with a direct stake in the resolution of those issues is just as important in the context of a specific claim for relief as it is in connection with the initial filing of a suit. Indeed, the danger of allowing a party to seek relief that does not benefit that party is well illustrated by this case. Petitioners are not suitable advocates to advance the claim of the United States or South Carolina for the imposition of civil penalties. As this Court noted in *Gwaltney,* allowing a private

party to assert claims for civil penalties can interfere with the remedial objectives of those charged with primary responsibility for enforcement of the Act: state and federal officials. These representatives clearly do have a cognizable interest in the award and amount of civil penalties. They may, as they choose, compromise civil penalties in aid of other objectives, weighing the public interest in one form of relief against the other.[23] In contrast, precisely because the private party has no direct stake in the penalty, allowing a private party to seek civil penalties puts the private party in the position of compromising those penalties in favor of its own private interests.

Neither Petitioner nor Amicus United States has thus far suggested any federal precedent for allowing a private party to obtain a remedy—whether for civil penalties or otherwise—that provides no benefit to that party.[24]

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[23] The specific illustration of such a compromise in the public interest, theorized by the Court in *Gwaltney,* is apt to the facts of this case. The Court asked the reader to suppose that

> the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.

484 U.S. at 60-61.

[24] There are rare situations where that might be permitted, and none of them is without controversy. For example, where a party has successfully obtained an injunction, an unrelated private attorney may be appointed by the court to enforce the injunction through a criminal contempt action, even though the penalty on the contemnor would be paid to the court rather than as damages to the party itself. *See Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 809 (1987). But this example appears

Thus, allowing a party to pursue relief in which it has no personal stake puts the federal court in the position of resolving an issue about which there is no case or controversy. To the extent that the Court must reach the issue in this case, it should hold that a private plaintiff has no cognizable legal interest in pursuing any claim for civil penalties under Section 505 of the Clean Water Act.

B. If A Court May Impose Civil Penalties In A Citizen Suit, It Only Can Do So As An Adjunct To A Proper Injunction

In *Gwaltney*, the Court assumed that a civil penalty might properly be exacted in a citizen suit, presumably as a form of relief ancillary to the main action to enjoin the violation. 484 U.S. at 58-59.

That view may be based on the idea that once the court has jurisdiction over one "case" or "controversy" the court may make findings involving the same basic facts and issue a judgment assessing penalties payable to the public treasury. In other words, assuming a live controversy before the court, and a substantial overlap between the plaintiff's injunction suit and the showing necessary to justify the imposition of penalties, one might entertain extending the court's jurisdiction to "tax" penalties on behalf of the United States at the same time that it issues an injunction. This might occur, for example, where the alleged violation continued unabated up until trial.

This approach is difficult to justify. It would involve broadening jurisdiction in a manner quite different than with other forms of "supplemental jurisdiction." For example, prior to codification of the supplemental jurisdiction concept in 28 U.S.C. § 1367, under theories of pendent or ancillary jurisdiction, the federal courts' authority was extended to the entirety of a case, notwithstanding that the court would not independently have jurisdiction over each claim in that case. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, the situation hypothesized here would involve assuming jurisdiction over claims that are *beyond* the constitutional jurisdiction of the federal courts.

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closely tied to the need for the court to enforce its own orders. There may be other examples, but they are scarce, and almost certainly do not address a grant of authority of the type conferred by the Clean Water Act.

If, however, this Court concludes that it is permissible for a citizen-plaintiff to obtain a civil penalty judgment in some circumstances, the minimum requirement must be that no civil penalty be awarded absent the issuance of an injunction. Once it is clear that an injunction will not issue, the plaintiffs no longer have an interest in the controversy sufficient to sustain the jurisdiction of the federal court. Similarly, it would be improper (where the penalty rests on a deterrence rationale) to award penalties at a point in time when the court can plainly determine that violations have ceased.

To be sure, plaintiffs' mere pursuit of an injunction would indeed provide the court with continuing jurisdiction over the claim for the injunction. But to allow a court to issue civil penalties to any party that simply pursues an injunction would engender frivolous or unnecessary appeals (or arguments in the district court) in pursuit of an equitable remedy to which the plaintiffs are not entitled. Petitioners in this case acted quite properly by abandoning on appeal an effort to obtain an injunction that they presumably felt they could not win. If the court's authority to grant a penalty depends upon it having continuing jurisdiction over an injunction claim, an award of penalties can only be made as an adjunct to a proper and fully sustainable injunction granted to the

plaintiff. Accordingly, when the district court here found the injunction unwarranted, it likewise should have denied the request for an enhanced penalty. To find otherwise would allow the provisions of the Clean Water Act to trump Article III principles.

Disregarding the priority of Article III requirements, Petitioners and their Amici maintain that the deterrent force of the Clean Water Act is best served by making civil penalties available readily in citizen suits. They contend that it would undermine the Act to allow a defendant to avoid both an injunction and civil penalties simply by bringing itself into compliance with the Act. In so aguing, Petitioners confuse the general purposes of the Act with the more limited purpose of the citizen suit. Certainly, the main purpose of the Act is to ensure compliance with our nation's environmental laws. Primary enforcement of the Act, including pursuit of penalties, is the responsibility of federal, state and local agencies. *See Gwaltney*, 484 U.S. at 60. The role of the citizen suit is, at best, "supplementary" and "interstitial." *Id.* at 60-61. The citizen suit's primary purpose is to provide a mechanism by which the citizen can seek a halt to continuing violations of the Act that cause the citizen harm. The "harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Id.* at 59. That is the purpose of the notice provision, which gives the alleged violator the opportunity to bring itself into compliance and thereby obviate the citizen suit entirely. *See id.* at 60. If the violations are abated, there was, in Congress' view, no reason to allow the action.[25] An injunction is a powerful remedy. Pursuant to Federal Rule of Civil Procedure 65, for example, district courts may

[25] Moreover, civil penalties still can be imposed in an action brought by the state, federal and local officials primarily responsible for enforcement of the Act.

issue a preliminary injunction at the very outset of the case to prevent harm to the plaintiffs.[26]

Of course, were we to assume that civil penalties might still be awarded at the end of the case as an adjunct to a proper injunction, even less can be made of Petitioners' public policy argument. If, by abating violations, a firm can avoid not only an injunction but also civil penalties, this would provide a powerful incentive to bring itself into compliance with the Act. Such a result is consistent with the Act's primary purpose.

III. THE DISTRICT COURT LACKED JURISDICTION TO GRANT ANY REMEDY TO PETITIONERS

As noted above, the court of appeals properly held that the case could not continue consistent with the requirements of Article III. As shown below, the district court lacked jurisdiction over Petitioners' case from the outset.

A. Petitioners Had No Standing To Obtain Equitable Relief Because There Was No Harm To The Environment

The district court found "no demonstrated proof of harm to the environment" arising from the mercury discharge violations. JA 162. The absence of harm to the environment precludes a finding of either Article III standing or a finding of an ongoing violation that is a statutory prerequisite to seeking equitable relief.[27] The elements of standing

[26] In fact, the district court denied a preliminary injunction and Petitioners did not appeal that denial.

[27] The state consent decree entered before the suit began, mandated compliance with the mercury restrictions and required Laidlaw to continue to seek a technical solution. The district court ultimately found that Laidlaw had been forced to suspend its operations in 1992 in order to avoid violating the decree. JA 92-93.

> are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan, 504 U.S. at 561 (internal citations omitted) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

Petitioners failed to prove standing at trial. They alleged adverse environmental effects from Laidlaw's discharges in violation of its NPDES permit. But after hearing testimony from various experts and DHEC officials and reviewing nine years of objective biological data from the North Tyger River, the district court found "that prior mercury discharge limits *as high as 20 ppb* had *no adverse effect* on the indigenous biological community in the North Tyger River downstream from Laidlaw's facility." JA 157 (emphasis added).[28] The district court specifically found that "the water quality standard for mercury is currently being attained in the North Tyger River and . . . the overall quality of the river exceeds levels necessary to support propagation of fish, shellfish, and wildlife, *and recreation in and on the water*." JA 156 (emphasis added).[29]

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[28] Indeed, the court found that using Petitioners' choice of an EPA value range for environmental harm demonstrated only that the "water quality-based effluent standard was exceeded and not that any health or environmental harm resulted from that exceedance. . . . The plaintiffs' use of the 1-10 value range constitutes an acknowledgment that the NPDES permit violations at issue in this citizen suit ***did not result in any health risk or environmental harm***." JA 161 (emphasis added).

[29] This finding undermined Petitioners' standing allegation based on lessened recreational activities. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 1999 U.S. App. LEXIS 11201 (4th Cir. 1999) (plaintiffs were not injured, and therefore lacked standing, because evidence failed to establish adverse environmental impact); *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111, 121 (3d Cir. 1997) ("reduction in a person's recreational activity cannot support the injury prong of standing when a court also concludes that a polluter's violation of an effluent standard has not harmed the affected waterway and that it, in fact, poses no threat to that waterway").

Nor do the reporting and monitoring violations provide standing to seek equitable relief. Without more, an asserted "need" for information cannot satisfy Article III requirements. *See, e.g., Foundation on Econ. Trends v. Lyng*, 943 F.2d 79, 84-85 (D.C. Cir. 1991) (if "informational injury" alone were sufficient "a prospective plaintiff could bestow standing upon itself in every case"). Rather, there must be some material nondisclosure or environmental consequences traceable to the failure to report. There was none here. The district court found that:

> The monitoring and reporting violations proven to have occurred were a combination of anomalies interfering with properly installed detection equipment, instances where the detection equipment malfunctioned, and technical errors on reporting forms that even DHEC recognizes were a result of confusion as to how to properly complete the forms. These deficiencies were not the result of a failure either to install proper monitoring equipment or to submit timely DMRs.
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> * * * *
>
> In this case, Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, *produced no direct environmental impact*. There has been no demonstrated proof of harm to the environment.

JA 162 (emphasis added). Thus, correct monitoring and reporting would have provided plaintiffs with no addi-

tional information. In any event, a research interest in Laidlaw's report, without some interest in the effects of Laidlaw's discharges in the North Tyger River, cannot confer standing sufficient to provide Petitioners any equitable relief. *See Lujan*, 504 U.S. at 566.

B. South Carolina's Diligent Enforcement Efforts Barred Petitioners' Suit

As noted, the focus of the citizen suit provision is on the future, not the past. *Gwaltney*, 484 U.S. at 59. Moreover, the citizen suit provision was designed to supplement, not supplant, government action. *Id.* at 60. Thus, a court may not entertain a citizen suit where the State is diligently prosecuting an action against the defendant to "require compliance with" the relevant Clean Water Act provisions. The statute is explicit:

> No action may be commenced . . . if the . . . State has commenced and is diligently prosecuting a civil or criminal action in a court of . . . a State to require compliance with the standard, limitation, or order.

33 U.S.C. § 1365(b)(1)(B). *See also Gwaltney*, 484 U.S. at 60 ("citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility' ") (citing legislative history of Clean Water Act). An ill-conceived citizen suit could interfere with the enforcement efforts of state officials charged with primary enforcement responsibility. *See id.* at 61.

The pre-lawsuit compliance efforts of the State, through DHEC, are documented in the district court's findings. From 1986 to 1992, Laidlaw worked closely with DHEC to achieve compliance with a range of requirements including a stringent new 1.3 ppb mercury limit.[30] In September 1988, Laidlaw and DHEC executed the first consent order which required the facility to submit plans for a long range solution to address the very exceedances at issue in Petitioners' complaint. By March 1991, Laidlaw had achieved compliance with all limitations except for mercury. Thereafter, in December 1991, Laidlaw experienced a number of unexplained, abnormally high mercury discharges. JA 90. These high mercury discharges led DHEC enforcement officials to consider additional enforcement action in early 1992—before FOE mailed its 60-day notice letter to DHEC and Laidlaw on April 10, 1992. JA 90-91. The second consent decree, entered before FOE filed suit, required Laidlaw to "use every effort" to resolve the mercury problem, subjected violations to additional enforcement action, and provided continuing jurisdiction in the State court to ensure compliance. JA 82-83. As the district court found, that consent order caused Laidlaw to shut down its facility for extended periods in 1992 and to solve its mercury discharge problem. JA 92-93.

[30] By way of comparison, 2 ppb of mercury in drinking water is considered acceptable.

The record shows that Laidlaw cooperated with DHEC to achieve compliance with the Act (JA 180), and those undisputed, long-term efforts should have precluded federal jurisdiction over this case—for equitable relief or civil penalties. Petitioners focused their and the district court's attention away from DHEC's obvious oversight and enforcement *efforts* and onto the amount of the penalty imposed by the consent decree. The district court made the "amount of penalty" that DHEC had imposed the focus of its jurisdictional analysis. At that point the trial court veered off the proper § 1365(b)(1)(B) jurisdictional approach.

The district court's analysis and ultimate findings were clearly misdirected at the method the State used in assessing penalties. Because, as noted above, Petitioners had no direct interest in the award of civil penalties or their

amount,[31] their only potential interest was in assuring compliance with the law to prevent future harm to themselves. However, to be allowed even to commence a suit they must demonstrate that the State itself is not pursuing *compliance* by the permit holder. Thus, the showing of lack of diligence could only have properly been based on the State's efforts in assuring Laidlaw's *compliance* with the Clean Water Act,[32] not on second-guessing the State's assessment of penalties.

The need to focus clearly on the State's efforts to induce compliance is of special importance because of the potential that the citizen suit will interfere with state enforcement efforts. *See Gwaltney*, 484 U.S. at 60-61. In assessing state efforts under this provision, the district court may perhaps *consider* the civil penalties that were imposed by the State. But the focus must necessarily be upon whether the State agency is moving forward "to require compliance" with whatever standard, limitation, or order the defendant is asserted to be violating. That focus was clearly missing in the district court's first opinion. The district court not only focused on the wrong issues, but effectively supplanted the State's judgment with the view of an appropriate penalty espoused by Petitioners.[33] The district court

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31 Petitioners could have intervened in the state court case to challenge the $100,000 penalty or the terms of the consent decree, but elected to pursue their separate federal case.

32 *See Jones v. City of Lakeland*, 175 F.3d 410, 415 (6th Cir. 1999) ("the restrictions on citizen suits found in §§ 1365(b) and 1319(g)(6) are intended to prevent the filing of citizen actions that would be duplicative of ongoing state or federal agency action"); *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991) (when a state agency "has specifically addressed the concerns of an analogous citizen suit, deference to the agency's plan of attack should be particularly favored").

33 The State's enforcement judgment regarding the weight afforded to "economic benefits" and its rationale for entering into a consent decree with Laidlaw was explicitly analyzed and understood by the district court, which was presented with testimony explaining that "DHEC considers economic benefit in conjunction with good-faith attempts at compliance" in assessing penalties, and that in the case of Laidlaw, DHEC did not consider it to have "obtained any significant economic benefit." JA 97.

ultimately found that the State's efforts actually produced Laidlaw's complete compliance with all requirements of the Act within months of the consent decree. JA 162-63. Accordingly, the State was sufficiently diligent to preclude federal jurisdiction over Petitioners' suit.

IV. PETITIONERS ARE NOT ENTITLED TO ATTORNEYS' FEES

A. The Attorneys' Fee Question May Not Be Ripe For Decision

Petitioners claim the right to pursue attorneys' fees on the theory that they prevailed in this litigation by prompting Laidlaw to comply with the Act.[34] However, the attorneys' fee question comes to this Court in an odd posture. The district court has not yet ruled on Petitioners' fee request, deferring consideration of such a petition.

In light of its conclusion that Petitioners had not obtained a judgment in their favor, the court of appeals held in a footnote that Petitioners could not be considered "prevailing or substantially prevailing" parties under 33 U.S.C. § 1365(d).[35] 149 F.3d at 307 n.5.

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34 Petitioners do *not* appear to lay claim to attorneys fees on the theory that they prevailed by persuading the district court to impose an enhanced civil penalty. This Court has held repeatedly that to qualify as a prevailing party, the party must at least obtain some benefit to itself. *See Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992); *see also Hewitt v. Helms*, 482 U.S. 755, 760 (1987). Petitioners have no direct stake in the imposition of a civil penalty and those penalties could not provide any basis for a fee award.

35 The court of appeals relied on its opinion in *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (per curiam).

The footnote addressing fees may have been intended as a disposition but is better viewed as dicta. On appeal, Laidlaw continued to question the district court's initial jurisdiction, both in terms of Petitioners' constitutional and statutory standing. *If* the district court did not have jurisdiction over this suit at the outset, then the award of attorneys' fees would be improper.

But in addressing mootness, the court of appeals *assumed* that the district court had jurisdiction at the outset. This was proper—both mootness and standing are jurisdictional and, in dismissing, the court could choose between them. But the question whether plaintiffs were entitled to attorneys' fees was undoubtedly a *merits* question. While the court of appeals may have viewed this as an easy question in light of its own precedents, *Steel Co.* teaches that jurisdictional issues must be resolved before proceeding to the merits. 118 S. Ct. at 1016. Concededly, this case presented the matter to the court of appeals in a somewhat unique posture. At a minimum, however, *Steel Co.* counsels that a court not decide an issue on the merits before addressing all jurisdictional prerequisites.

In this Court, the same considerations control. If the Court agrees that the district court had no jurisdiction, that is dispositive of the fee claim. If the Court were to decide that the district court had jurisdiction at the outset, it can proceed to review the court of appeals' footnote on attorneys' fees. If the Court elects to allow the court of appeals to address the jurisdictional questions in the first instance, *Steel Co.* suggests that this Court *not* proceed to address the fee petition on the merits.

B. Petitioners Are Not Entitled To Attorneys' Fees Under *Farrar*.

If a plaintiff must obtain a judgment or settlement in its favor in order to be deemed a "prevailing party" under *Farrar v. Hobby*, 506 U.S. 103 (1992), then Petitioners'

claim to fees must be rejected. Petitioners do not argue any contrary view. Rather, they argue that the court of appeals was wrong in rejecting the "catalyst" theory. Even if the catalyst theory is viable, however, it would not warrant a fee award in this case.

In *Farrar* the Court clearly established that a "material alteration of the legal relationship of the parties" is the prerequisite for the fee award to a "prevailing" party. *Id.* at 111 (quoting *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93 (1989)). The Court held that "[no] material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." 506 U.S. at 113. The Court explained that

> to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable *judgment* against the defendant from whom fees are sought, or comparable relief through a *consent decree* or *settlement*. Whatever relief the plaintiff secures must directly benefit him at the time of the *judgment* or *settlement*. Otherwise, the *judgment* or *settlement* cannot be said to "affec[t] the behavior of the defendant toward the plaintiff."

506 U.S. at 111 (emphasis added) (internal citations omitted). *Farrar* directs the result reached by the court below. *Farrar* necessarily supersedes any earlier suggestion that the informal effect of a lawsuit on defendant's behavior may render a plaintiff a prevailing party.

Only a party that has achieved some measure of enforceable relief "prevails" in the lawsuit. Petitioners' own discomfort with a defendant's proclamation that it has voluntarily ceased violating the law highlights the very significant difference between voluntarily ceasing conduct

on the one hand, and an enforceable judgment or settlement agreement on the other.

With *Farrar* as the guiding standard, this case illustrates inherent difficulties in trying to apply a "catalyst theory." Before this lawsuit was filed, Laidlaw committed itself to make "every effort" to eliminate any violations. JA 82. To the extent that any outside pressure was necessary, the State was applying that pressure, playing an active role in forcing compliance. Yet, under Petitioners' theory, one can easily imagine a trial devoted to determining whether Petitioners or the State or Laidlaw's consultants, or Laidlaw itself (which ultimately found the technical solution), was responsible for resolving the mercury problem that earlier challenged the facility. Congress could not have wanted to encourage satellite litigation over fees where the basic issue of liability for fees would be so difficult to determine. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

Moreover, even assuming *arguendo* that the catalyst theory of prevailing party status has vitality, this case would take that theory farther than it could properly go, even by its own terms. To prevail under this theory, the June 12, 1992 citizen suit would have to have been responsible for bringing Laidlaw into compliance with its NPDES permit. But the two opinions of the district court make clear that the citizen suit had nothing to do with Laidlaw's compliance.

This case does not involve an NPDES permit holder and state environmental agency galvanized into action by the filing of a citizen suit. The district court's two decisions chronicle the nearly six years of continuous, pre-citizen suit activity by Laidlaw and DHEC to solve the mercury discharge problem. This included, among other things, the commencement of an enforcement action and subsequent entry of a consent order in 1988 that led to

the installation of the Lancy system, the complete elimination of non-mercury exceedances, and a process of continual experimentation with new technology that ultimately eliminated mercury exceedances.[36]

As noted above, DHEC and Laidlaw were engaged in enforcement/compliance activities *before* Petitioner mailed its 60-day notice letter on April 10, 1992. During this 60-day notice period, a formal enforcement conference was held on May 21, 1992 which led directly to a June 8, 1992 consent agreement that was then approved by a state court judge on June 10, 1992. JA 90-91, 146-47. The need to satisfy the consent decree compelled compliance. JA 92, 147 ("As the mercury problems continued to be investigated, the defendant [Laidlaw] had to simply shut down the incinerator altogether for substantial periods of time in July, August, September and November 1992, in an effort not to violate either its mercury parameter or the judicial consent order with DHEC.").

After entry of the June 8, 1992 consent decree, Laidlaw added new carbon adsorption equipment in July 1992 and installed prefilters to protect (and enhance the performance) of this equipment in January 1993. *Id.* Once Laidlaw learned how to maximize the efficiency of the new carbon adsorption equipment, the mercury problem was solved.

The record thus establishes unequivocally that the "catalyst" to compliance was a combination of DHEC's and Laidlaw's enforcement/compliance efforts. The district court so found:

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[36] Petitioners inaccurately contend that Laidlaw's mercury problems were caused by its failure to properly control its mercury feed rate. Pet. Br. 5. The suggestion that Laidlaw readily possessed the ability to avoid its permit violations by lowering the feed rate was rejected by the district court. JA 174-75.

> An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation. Further, DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of time.

JA 162-63. Simply stated, compliance was the product of Laidlaw's and DHEC's intervention. Petitioners are not, under any theory, entitled to recover fees and costs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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